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CHIN KAH WENG & ORS v. MINISTER OF LOCAL GOVERNMENT AND HOUSING, SABAH & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RAVINTHRAN PARAMAGURU J
[CIVIL CASE NO: BKI-13NCVC-7-9-2016]
B 13 MARCH 2017

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Review of administrative decision – Application to challenge Minister's decision – Delay in delivery of vacant possession for residence – Developer obtained extension of time*
C *from Ministry of Local Government and Housing, Sabah – Whether Minister approved appeal for extension of time – Whether decision was made by Minister or Controller of Housing – Whether there was a breach of rr. 12 & 14 of Sabah Housing Development (Control and Licensing) Rules 2008 – Whether decision could be challenged – Whether decision legal – Whether complied with procedure*

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The applicants had purchased apartment units in a property project known as Light Residences, from the second respondent ('the developer'), between 12 December 2012 and 6 February 2013. Under the agreement, the developer was obliged to deliver vacant possession within 36 months of the date of signing of the agreement. However, the developer obtained the
E occupation certificate on 1 June 2016 and delivered vacant possession to the applicants on 22 June 2016, past the agreed completion date. In a letter dated 22 June 2016, the applicants were informed by the developer that the first respondent, the Minister of Local Government and Housing, Sabah ('the Ministry') had approved the developer's appeal for extension of time
F of six months to complete the apartment units. The letter from the Ministry, dated 1 February 2016 ('the February 2016 letter'), which approved the extension of time, was extended to the applicants. By way of judicial review, the applicants sought a *certiorari* order to quash the decision of the Minister in the February 2016 letter on the ground that the extension of time was in
G breach of the Sabah Housing Development (Control and Licensing) Rules 2008 ('the Rules') as the power to grant an extension of time is vested in the Controller of Housing ('the Controller'), not the Minister. The Minister's defence was that (i) the February 2016 letter should be read together with the letter from the developer dated 15 December 2015 requesting for an
H extension of time ('the December 2015 letter'); and (ii) he did not make the decision in the February 2016 letter; the decision was issued by the permanent secretary of the Ministry, who was also the Controller. On the other hand, the developer's defence was that it had made an application to the Controller for extension of time but after receiving no reply, an appeal was made to the Minister *via* the December 2015 letter. The issues that arose
I for the court's determination were whether (i) the Minister had made a decision; and (ii) whether the said decision could be challenged under the accepted grounds of judicial review.

Held (quashing decision of first respondent):

(1) The February 2016 letter was issued with the letterhead of the Ministry. The subject line of the letter was 'Permohonan Lanjutan Masa Pembangunan Kediaman Cahaya (The Light Residences)'. It referred to the December 2015 letter to the Minister. The contents of the February 2016 letter was couched in simple language. It stated, categorically and without equivocation, that the Minister had approved the 180 days extension of time sought by the developer. In the penultimate paragraph, it advised the developer to inform all affected purchasers. The February 2016 letter was signed by Datuk Matius Sator. He did not sign it in his capacity as the Controller but as the permanent secretary of the Ministry. Therefore, the argument that the Minister did not make any decision to grant extension of time to the developer was without any merit. (paras 16 & 17)

(2) The decision in the February 2016 letter was the decision of the Minister and not that of the Controller. It must be deemed that the Controller never made a decision in the instant case under r. 12 of the Rules. The statutory power to grant exemption from complying with the provisions of a housing contract in the first instance lies with the Controller. This is stated in the unmistakable language of r. 12 of the Rules. However, instead of waiting for the decision of the Controller, the developer appealed to the Minister and procured a decision in their favour. The act of the Minister in granting extension of time, without there being a decision by the Controller in the first place, was a clear breach of written laws, *ie*, rr. 12 and 14 of the Rules. The Minister's act therefore fell squarely under the 'illegality' and 'procedural impropriety' grounds upon which an administrative decision might be reviewed. (para 20)

Case(s) referred to:

AmBank (M) Bhd v. Menteri Sumber Manusia & Anor And Another Appeal [2014] 1 LNS 686 CA ***(refd)***

Council of Civil Service Unions and Others v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Enactment 1978 (Sabah), ss. 4(1), 26

Housing Development (Control and Licensing) Rules 2008, rr. 12(4), 14

For the applicants - Kong Hong Ming; M/s Lee & Kong
For the 1st respondent - PK Lim & Mohd Faizal Izuddin; AG's Chambers, Sabah
For the 2nd respondent - Joan Goh; M/s Goh & Assocs

Reported by Najib Tamby

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JUDGMENT

Ravinthran Paramaguru J:

Introduction

B **[1]** The applicants, in this case, are purchasers of apartment units in a property project known as Light Residences. The first respondent is the Sabah Minister of Local Government and Housing and the second respondent is the developer of the said project. I shall refer to them as the Minister and the developer respectively. Under the Sabah Housing Development (Control and Licensing) Rules 2008 (the Housing Rules) the C Controller of Housing (the Controller) is empowered to give a waiver in respect of any of the provisions of a contract between a housing developer and the purchaser. The Housing Rules are made under s. 26 of the Sabah Housing Development (Control and Licensing) Enactment 1978 (the Housing Enactment). The decision of the Controller is appealable to the D Minister. In this judicial review application, the applicants are challenging a purported decision of the Minister. He had allegedly granted a waiver of the obligation of the developer under the contract clause pertaining to the prescribed completion period. He had extended it by six months. The background facts of this judicial review application are slightly curious. E Unlike in most other judicial review applications, the Minister is not defending the propriety or correctness of the impugned decision. Instead, the Minister is contending that he did not make the decision in question at all.

Background Facts

F **[2]** The applicants in question had purchased their respective apartment units from the developer between 12 December 2012 and 6 February 2013. Under cl. 1(o) of the First Schedule General Terms of Agreement, the developer was obliged to deliver vacant possession within 36 months of the date of signing of the agreement. However, the developer only obtained the occupation certificate on 1 June 2016 and delivered vacant possession to the G applicants on 22 June 2016. By then, the agreed completion date in respect of all the apartment units in question had passed. The total liquidated ascertained damages (LAD) payable in respect of the 20 apartment units is RM356,365.78. The particulars are set out in the appendix to the statutory statement. I shall pause here to note that the above facts were not disputed H by the Minister or the developer. However, the potential claim of the applicants for LAD was frustrated on the same day that they were told to take the keys to their property. In a letter dated 22 June 2016, the applicants were informed by the developer for the first time that the Minister had approved the developer's appeal for extension of time of six months to complete the Light Residences. The letter from the Ministry of Local Government and I

Housing dated 1 February 2016 was extended to the applicants. The applicants have now taken out the instant judicial review proceedings alleging that the extension of time given by the Minister was in breach of the Housing Rules. The principal ground is that the power to grant an extension of time in the first instance is vested in the Controller and not the Minister under Housing Rules. The order sought by the applicants is as follows under prayer (1) of the application:

> An Order of *Certiorari* to remove into this Honourable Court and to quash the decision of the 1st Respondent given in the letter dated the 1st of February 2016 approving an appeal for extension of time of 180 days to the Developer to complete the Light Residences at Penampang.

Defence Of Minister

[3] In the affidavit in opposition dated 7 December 2016, the Minister denied that the developer had made an appeal to him in their letter dated 15 December 2015 for extension of time under the Housing Rules. Thus, the Minister denied making a decision in the letter of the Ministry of Local Government and Housing dated 1 February 2016. The facts narrated by the Minister in the affidavit in opposition in respect of the events leading to the issuance of the letter dated 1 February 2016 are as follows. The Minister averred that on 16 October 2015, the developer had applied for the said extension from the permanent secretary of his Ministry. It is common ground that permanent secretary has also been gazetted as the Controller of Housing. The developer then wrote a second letter dated 15 December 2015 to the Minister appealing for extension of time. The Minister wrote a note (sila bincang) on this letter for the attention of the Controller asking him to discuss the matter. The Controller referred the letter to the housing engineer (jurutera perumahan or JP) for action. The housing engineer recommended that a meeting be held with the District Council and the Drainage and Irrigation Department. For the purpose of the said meeting, the developer submitted a report to justify the extension. The Controller wrote the following minute on the report (marked as M-5).

> JP.1
>
> Sila semak submission dan ambil tindakan lanjut
>
> seperti mesyuarat yang telah ditetapkan ... arahan YP MKTP seperti
>
> di atas.
>
> Signed
>
> 25/1/16

[4] When the said report (M-5) with above-mentioned notation of the Controller was passed to the Minister one day before the said meeting, he wrote the following crucial and perhaps decisive note on it. It is addressed to the housing engineer:

Gabriel

Tiada halangan untuk bagi lanjutan 6 bulan lagi.

Signed

D. Hajiji

25/1/16

Datuk Seri Panglima Haji Hajiji Haji Noor

Menteri Kerajaan Tempatan Dan Perumahan Sabah

[5] In para. 10.8 of the affidavit in opposition, the Minister averred that subsequently, the permanent secretary of his Ministry wrote the letter dated 1 February 2016 to the developer granting the extension of time of 180 days in respect of the delivery period. The Minister further averred that the letter dated 1 February 2016 should read together with the letter of the developer dated 15 December 2015 to him requesting extension of time. Finally, the Minister averred that the decision contained in the letter dated 1 February 2016 was issued by the permanent secretary who is also the Controller and that he as the Minister was empowered to give him any direction in respect of the powers of the Controller under the Enactment. Thus, to sum up, the Minister had said that it was the Controller who made the decision to grant extension of time in the impugned letter dated 1 February 2016.

Defence Of The Developer

[6] The defence disclosed in the first affidavit of the developer is markedly different from that of the Minister. This affidavit pre-dates the affidavit of the Minister by one month. In the affidavit in opposition dated 26 October 2016, Tan Chew Peng who is the project manager averred that the developer had made an application *via* letter dated 16 October 2015 to the Controller for extension of time. The justification for the application was that the access road to the Light Residences could not be completed because of opposition from the residents of a neighbouring housing estate known as Taman LT Jaya. Tan Chew Peng further averred that since the developer did not receive a reply to their application dated 16 October 2015, an appeal was made to the Minister *via* letter dated 15 December 2015 under s. 14. In paras. 6(h)(v) and (vi), the developer through the affidavit of Tan Chew Peng adopted the position that the Minister had made a decision in the letter dated 1 February 2016 and that it is binding. The relevant paragraphs are as follows:

> (v) The developer further says that the decision of the Minister pursuant to s. 14 of the 2008 Rules is final and the same cannot be questioned in any court.
>
> (vi) the developer says further that any extension of time granted is the sole discretion of the first respondent and its relevant Minister.

[7] In the further affidavit dated 14 December 2016, Tan Chew Peng did an about-face and repudiated the averment in the first affidavit that the developer had made an "appeal" to the Minister. He stated that there was no "appeal" to the Minister as there was no "decision" by the Controller. Paragraph 6 of the further affidavit captures the U-turn made by Tan Chew Peng:

> In view of what has transpired as deposed in paragraph 9 (all sub-paragraphs included) in the 1st respondent's affidavit, I say that there was never an appeal to the Minister as **there was no decision made by the Controller pursuant to the Housing Development (Control And Licensing) Rules**, hence the position of the Developer as far as the letter dated 15th December 2016 is immaterial and irrelevant. (emphasis added)

[8] For good measure, he also deposed that "as to how" the developer's application was handled by the Ministry was beyond the former's control and therefore they should not be prejudiced.

Power Of Controller And Minister

[9] Before I proceed to consider the crucial issues in this judicial review application, I shall make brief reference to the Housing Development (Control and Licensing) Rules 2008. It gives the Controller the limited power to regulate and even alter the contractual obligations of private parties under sale and purchase agreements that come within its ambit. Section 12(4) of the Rules which grants the power to the Controller to waive compliance with any provision of the sale and purchase agreement reads as follows:

> 12 (4) Where the Controller is satisfied that owing to special circumstances or hardship or necessity, compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions.
>
> 14. Notwithstanding anything to the contrary in these Rules, any housing developer aggrieved by the decision of the Controller under sub-rule 3(2), sub-rule 4(1), sub-rule 5(3), sub-rule 9(2) or sub-rule 12(4) may, within fourteen (14) days after having been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court.

[10] It must be noted that under s. 12(4), the power to waive or modify compliance with "any" provision of the contract is in the first instance exercisable only by the Controller. The ground stated in s. 12(4) upon which the Controller may exercise his discretion is "special circumstances or hardship or necessity". The "waiver" must be given by way of a "certificate in writing". Only if a housing developer is aggrieved by the decision of the Controller, an appeal may be made to the Minister whose decision is final.

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Issues

[11] In addressing the issues in this case, I shall bear in mind that judicial review is a review of the decision-making process of the public authority and is not appeal on the merits of the decision of the public authority. Therefore, the discretion vested by law in the public authority should not be lightly substituted with that of the court unless the discretionary power has been exercised in breach of the applicable law or without regard to principles of natural justice. The commonly accepted grounds to challenge the decision of an administrative authority are illegality, procedural impropriety, irrationality and proportionality (see *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] AC 374 and *AmBank (M) Berhad v. Menteri Sumber Manusia & Anor And Another Appeal* [2014] 1 LNS 686. Before I proceed further, I shall also observe that in the instant case, there is no pleading to the effect that the power conferred under the Housing Rules to the Controller and the Minister is *ultra vires* the Housing Enactment or is otherwise illegal. Thus the main issues would be whether the Minister had made a decision and whether his decision can be challenged under the accepted grounds of judicial review.

[12] The judicial review application is directed against the purported "decision" of the Minister in the letter of the Ministry of Local Government and Housing dated 1 February 2016. However, the Minister in his affidavit in opposition denied making the decision. He said that it was the Controller who made a decision to grant an extension of six months. His counsel submitted that there is no decision by the Controller that is "adverse" to the developer. Therefore, the developer could not have possibly appealed to the Minister under the Housing Rules. It follows that the Minister did not hear any appeal and therefore could not have made any decision under the Housing Rules in the letter dated 1 February 2016. On the other hand, as I have said earlier, the developer affirmed that the Minister had made a decision pursuant to their appeal under s. 14 and that his decision in the letter dated 1 February 2016 is final. In the further affidavit in opposition that I adverted to earlier, to quote a line from Lewis Carrolls's *Alice in Wonderland*, the position of the developer got "curiouser and curiouser". The developer resiled from the position adopted in the first affidavit. Their project manager stated that no appeal was made to Minister as the Controller did not make any decision.

[13] Thus, to all intents and purposes, the developer in the further affidavit seems to say that neither the Minister nor the Controller made a decision on their application for extension of time. This averment is ironical and perhaps even farcical because if there is no decision by the Minister or the Controller, the developer would be exposed to potential a LAD claim which is what an application for extension of time seeks to defeat. As this is not an issue in this judicial review application and I shall not address it. But to cut through the thicket of conflicting and confusing positions taken by the parties in this

application, I shall firstly address the fundamental question whether the Minister had, in point of fact, made the decision found in the letter dated 1 February 2016.

Whether Minister Made A Decision To Extend Time?

[14] In arguing that the Minister did not make a decision, his counsel submitted that the letter of the developer dated 15 December 2015 to the Minister was not an "appeal" within the meaning of s. 14 of the Housing Rules as the word "appeal" was used in a "loose" sense in the said letter. He also argued that there could not have been a legal "appeal" as the Controller had yet to make a decision when the developer wrote to the Minister on 15 December 2015. He said that an appeal could be made to the Minister only if the Controller had made a decision adverse to the developer. I find no merit in the above arguments for the following reasons.

[15] In the first place, the project manager of the developer stated in the affidavit in opposition that the developer appealed to the Minister under the Housing Rules in the letter dated 15 December 2015 because the Controller did not respond to their application. In the second place, whether there could or could not have been a proper appeal to the Minister is beside the point and irrelevant. The purpose of a judicial review application is to challenge an administrative decision or act of a public authority. Assuming that the administrative decision or act was made or done without regard to written law, it can be challenged under the "illegality" or "procedural impropriety" grounds. However, it does not necessarily mean that an administrative decision that was made in breach of written law is not a "decision" and therefore is not amenable to the judicial review process. To hold otherwise would mean that the judicial review process would be completely emasculated with no practical purpose to serve in cases where a public authority had flouted procedure set down by written law. To my mind, the correct approach would be to examine whether the Minister had made any decision without first embarking upon an inquiry whether such a decision is legally "possible" under the Housing Rules. The starting point for this exercise should be the letter dated 1 February 2016 which is addressed to the developer. For ease of reference, I shall reproduce below the said letter shorn of the letterhead of the Ministry of Local Government and Housing and the reference number:

01 Februari 2016

RA Concept Development Sdn Bhd
Lot 23-1, 1st Floor, Riverside Plaza
Block C, Kingfisher Park
88400 Kota Kinabalu

PERMOHONAN LANJUTAN MASA PEMBANGUNAN
KONDOMINIUM KEDIAMAN CAHAYA (THE LIGHT RESIDENCES)

Surat permohonan tuan rujukan RACD/KK/10/1607/ec bertarikh 15 Disember 2015 serta mesyuarat pada 26 Januari 2016 untuk perkara tersebut di atas adalah dengan segala hormatnya dirujuk.

2. Sila ambil maklum bahawa setelah mendengar dan meneliti pembentangan permohonan lanjutan masa oleh pihak tuan, sukacita dimaklumkan bahawa YB Menteri Kerajaan Tempatan dan Perumahan meluluskan lanjutan masa sebanyak 180 hari kepada pihak tuan untuk menyiapkan pembangunan Kondominium Kediaman Cahaya (The Light Residences).

3. Pihak tuan adalah dinasihatkan untuk memaklumkan keputusan ini kepada semua pembeli-pembeli rumah yang terlibat.

Sekian, terima kasih.

BERKHIDMAT UNTUK NEGARA DENGAN BERSIH, CEKAP DAN AMANAH

(DATUK MATIUS SATOR)

Setiausaha Tetap/Pegawai Perumahan

S.k. YB Menteri Kerajaan Tempatan dan Perumahan
Tingkat 6, Block C, Wisma Tun Fuad Stephens
88999 Kota Kinabalu

[16] The following observations may be made about this letter. It is issued with the letterhead of the Ministry of Local Government and Housing. The subject line of the letter is "Permohonan Lanjutan Masa Pembangunan Kediaman Cahaya (The Light Residences)". It refers to the letter of the developer dated 15 December 2015 to the Minister. As to the content of the letter, it is couched in simple language. Its meaning is as plain and clear as language can express it. I do not propose to provide a *verbatim* translation of the letter which is written in the National language. But I shall paraphrase it here nonetheless. The letter says categorically and without equivocation that the Minister had approved (luluskan) the 180 days extension of time sought by the developer. In the penultimate paragraph, it advises the developer to inform all affected purchasers. The letter is signed by Datuk Matius Sator. He did not sign it in his capacity as Controller of Housing but as the permanent secretary of the Ministry. It appears that the advice of the permanent secretary was heeded. It must be recalled that this letter was the only document given to the applicants in this case by the developer to stifle potential LAD claims.

[17] Assuming that the letter dated 1 February 2016 is the decision of the Controller as argued by counsel for the Minister, it is completely perplexing and even illogical that the signatory had stated positively that the Minister had approved the extension sought by the developer. It must be noted that the signatory of the letter, ie, Datuk Matius Sator did not file any affidavit to explain the contents of the letter. In fact, the note written by the Minister

to the housing engineer to the effect that he had no objection to the extension of six months supports the conclusion that Minister had made the very decision that is so plain and obvious in the letter dated 1 February 2016. In the premises, the argument that the Minister did not make any decision to grant extension of time to the developer is utterly without any merit. For this reason, the alternative argument of counsel for the Minister that the Controller should have been joined as a respondent is also without merit.

[18] The final argument of counsel for the Minister in respect of this issue is that even if the Minister had given a direction to the Controller to grant extension of time, it was within his powers under s. 4(1) of the Housing Enactment that reads as follows:

> 4. (1) The Minister shall, by notification in the *Gazette*, appoint an officer to be the Controller of Housing who shall, subject to the direction of the Minister, perform all duties imposed and exercise all powers conferred on the Controller by this Enactment.

[19] With respect, I am of the view that the above argument lacks merit for the following reasons. Section 4(1) appears to be a general provision that subjects the Controller to the supervision of the Minister in respect of the powers conferred on the Controller under the Housing Enactment. However, the power of the Controller to grant extension of time is not a power that is granted under the Housing Enactment itself. It is specifically granted under the Housing Rules made under the Enactment. The Housing Rules has clearly provided a two-tier structure in rr. 12 and 14 for the purpose of exempting a housing developer from complying with all the conditions of a housing contract. Thus, these are special provisions. The general rule of construction stated in the Latin maxim *specialia generalibus derogant* is that special provisions derogate from general provisions. There is a very good reason to adhere to this rule of construction in the instant case. If the argument of counsel that the Minister can legally direct the Controller to give the extension of time is correct, it would mean that rr. 12 and 14 of the Housing Rules are rendered otiose and that the two-tier structure set up under the said provisions for exemption applications is effectively demolished. To my mind, this cannot be the intention of s. 4(1) of the Housing Enactment which only appears to place the Controller under the general supervision of the Minister. I, therefore, find that s. 4(1) of the Housing Enactment cannot assist the Minister in defending the decision contained in the letter dated 1 February 2016.

Whether Decision Of Minister In Breach Of Written Law?

[20] In the foregoing passage, I have found as a fact that the decision in the letter dated 1 February 2016 was the decision of the Minister and not that of the Controller. The Minister had extended the completion period by six months in this letter. There is no evidence that the Controller had made any

decision in this case. No decision of the Controller was ever furnished to the applicants. In fact, the unsuccessful argument of the Minister was that the letter dated 1 February 2016 constituted the decision of the Controller. In the premises, it must be deemed that the Controller never made a decision in the instant case under r. 12 of the Housing Rules. As correctly submitted by counsel for applicants, the statutory power to grant exemption from complying with the provisions of a housing contract in the first instance lies with the Controller. This is stated in unmistakable language in r. 12 of the Housing Rules. However, instead of waiting for the decision of the Controller, the developer had appealed to the Minister and procured a decision in their favour. In my view, the act of the Minister in granting extension of time without there being a decision by the Controller in the first place is a clear breach of written law, ie, r. 12 and r. 14 of the Housing Rules. The Minister's act therefore falls squarely under the "illegality" and "procedural impropriety" grounds upon which an administrative decision may be reviewed.

Conclusion

[21] I am mindful that counsel for applicants had raised other issues such as the issue that the decision was bad because the applicants were not given a right to be heard and that no material was adduced to prove special circumstances that justify extension of time. However, in view of my finding that the Minister had made the decision contained in the letter dated 1 February 2017 and that it is flawed for non-compliance with written law, I find that the other issues do not fall to be considered. For the foregoing reasons, I shall quash the decision of the Minister in the letter dated 1 February 2016. I shall grant order in terms of prayer (1) of encl. 4. The first respondent is ordered to pay costs to the applicants in the sum of RM10,000. The second respondent is ordered to pay costs of RM5,000 to the applicants.